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Rights Without Remedies

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I. INTRODUCTION

In *Shelby County v. Holder,*[1] the State of Alabama challenged two provisions of the Voting Rights Act ("Act")[2] that regulated voting laws at the state level.[3] Section Five of the Act required state and local governments with a history of voter discrimination to obtain preclearance from the federal government before implementing changes to their voting laws.[4] Section Four sets forth a coverage formula to identify states that would be subject to the preclearance requirement.[5] In 2006, Congress voted overwhelmingly to reauthorize the Act for another 25 years.[6] The Senate voted 98-0 in favor of re-authorization.[7]

Alabama challenged the constitutionality of Sections Four and Five by arguing, among other things, that *current* incidents of voter discrimination were no worse than in states that were not subject to the preclearance requirement.[8] In a 5-4 decision, despite Congress's overwhelming support in favor of re-authorization, the Supreme Court invalidated § 4(b), with Justice Thomas arguing in a concurring opinion that he would have invalidated both provisions.[9] Writing for the majority, Chief Justice Roberts held that the coverage formula was based on decades-old evidence of state-specific voter discrimination and failed to consider Alabama's *current* record of voter discrimination when identifying states that would be subject to the preclearance requirement.[10] Surprisingly, the Court afforded no deference to Congress, despite the fact that an

1. Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013).
2. *See* Voting Rights Act of 1965, 42 U.S.C. §1973 (1965) (transferred to 52 U.S.C. § 10301).
3. *Shelby Cty.*,133 S. Ct. at 2615.
4. *See id.*; *see also* 42 U.S.C. § 1973c(a).
5. *See Shelby Cty.*, 133 S. Ct. at 2615.
6. *See id.*
7. *See id.* at 2635 (Ginsburg, J., dissenting).
8. *See* Reply Brief for Petitioner at 15–16, Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96), 2013 WL 823229, at *15–16 ("Current conditions differ dramatically from those Congress confronted in 1975 just 10 years after passage of the VRA. At that time, '[s]ignificant disparity persisted between the percentages of whites and Negroes registered in at least several of the covered jurisdictions.'").
9. *See Shelby Cty.*, 133 S. Ct. at 2631.
10. *See id.* (stating that "[o]ur country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions").

overwhelming number of legislators voted for the Act's re-authorization.[11]

In *National Federation of Independent Investors v. Sebelius*,[12] however, deference to Congress was on full display when the Court upheld the Affordable Health Care Act's individual mandate.[13] Again writing for a 5-4 majority, Chief Justice Roberts emphasized that "[p]roper respect for a coordinate branch of the government requires that we strike down an Act of Congress only if the lack of constitutional authority to pass [the] act in question is clearly demonstrated."[14]

How can the Court's holding in *Shelby County*—in which not a single senator voted against re-authorization—be reconciled with the Court's reasoning in *Sebelius*, which involved a law that deeply divided Congress? The distinguishing factor in *Shelby County* was the Court's belief that the legislative process could not adequately confront this issue.[15] As Justice Scalia stated during oral argument, members of Congress may have been reticent to vote against the Act's re-authorization because of the political fallout that such a vote would engender:[16] Justice Scalia stated as follows:

> I don't think there is anything to be gained by any Senator to vote against continuation of this act. And I am fairly confident it will be reenacted in perpetuity unless—unless a court can say it does not comport with the Constitution . . . *It's—it's a concern that this is not the kind of a question you can leave to Congress.* There are certain districts in the House that are black districts by law just about now. And even the Virginia Senators, they have no interest in voting against this. The State government is not their government, and they are going to lose- -they are going to lose votes if they do not reenact

11. *See id.* (invalidating the Act while noting that "[s]triking down an Act of Congress 'is the gravest and most delicate duty that this Court is called on to perform'" (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring))).

12. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

13. *See id.* at 2608 (finding that "it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance").

14. *Id.* at 2579 (quoting United States v. Harris, 106 U.S. 629, 635 (1883)) (internal citations omitted). Chief Justice Roberts rejected the argument that the individual mandate was permissible under the Commerce Clause, but found that the mandate was valid under the Taxing and Spending Clause. *See* U.S. CONST., art. I., § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.").

15. *See, e.g.*, Transcript of Oral Argument at 47–48, Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96), http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-96_7648.pdf

16. *See id.*

> the Voting Rights Act. Even the name of it is wonderful: The Voting Rights Act. Who is going to vote against that in the future?[17]

Simply put, political pressures made it difficult, if not impossible, for the legislature to pass corrective legislation. In these circumstances, judicial intervention is *necessary*—no matter how lopsided the vote. The Court's decision is not anomalous: federal courts have often intervened to decide legal issues where political considerations make it difficult, if not impossible, for Congress or the Executive Branch to remedy cognizable legal harms.[18]

Thus, although "great social and political problems [are better] resolved in the political arena,"[19] there are some issues that "at times seem to defy such resolution."[20] In *Shelby County,* the Court intervened precisely because "the executive and legislative branches [were] paralyzed by concern over their own tenure and individual careers."[21] The Court should do the same when confronted with laws that infringe on the constitutional rights of citizens' who are politically powerless and depend on the courts to provide redress for arbitrary legislation. Put differently, the Court's decision in *Shelby County* can—and should—have lasting implications for a doctrine that was not even at issue: Article III standing.[22] In situations where elected representatives are unable or unwilling to resolve matters that, among other things, implicate fundamental constitutional rights, the Court should intervene to protect citizens who lack recourse through the legislative process. As one court explained, "the judiciary must bear a hand and accept its responsibility to assist in the solution *where constitutional rights hang in the balance.*"[23]

The Court's current standing doctrine, nonetheless, leaves citizens vulnerable to the arbitrary actions (or inactions) of government. The Court has interpreted the "case or controversy" requirement in Article III to bar litigants from challenging laws unless they have suffered a concrete injury ("injury in fact") that is caused by the law in question and

17. *See id.* (emphasis added)

18. *See, e.g.,* Derek Funk, Comment, *Checking the Balances: An Examination of Separation of Powers Issues Raised By the Windsor Case,* 46 ARIZ. ST. L.J. 1471, 1489 (2013) (stating that "[b]ecause Congress's main checking power is "the power to legislate," Congressional refusal (or inability) to assert itself as the primary policy maker invites the executive and judicial branches to expand their spheres of influence at Congress's expense").

19. Jeffrey H. Bowman, *Slow Dance on the Killing Field When Justices Fail to Dispense Justice,* 32-JUL ARIZ. ATT'Y 20, 35 (1996) (quoting Hobson v. Hansen, 269 F. Supp. 401, 517 (D.D.C. 1967)) (alternation in original).

20. *Id.* (quoting *Hobson*, 269 F. Supp. at 517).

21. *Id.*

22. *See* U.S. CONST. art. III, § 2.

23. Bowman, *supra* note 19, at 35 (quoting *Hobson*, 269 F. Supp. at 517) (emphasis added).

redressable through the judicial process.[24] These requirements strive to ensure that the judiciary avoids interfering in matters that are properly left to Congress and the democratic process.[25] As Justice Scalia explains, "standing is a crucial and inseparable element of [separation of powers] whose disregard will inevitably produce—as it has during the past few decades—an overjudicialization of the processes of self-governance."[26]

However, in some circumstances, elected representatives "prevent action . . . to serve their own political interests,"[27] and lack the political will to confront laws that result in cognizable legal harm.[28] In addition, elected representatives may employ techniques, such as racial gerrymandering, to entrench power and marginalize the voices of dissenting

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24. *See* Emily A. Berger, Comment, *Standing at the Edge of a New Millennium: Ending a Decade of Erosion of the Citizen Suit Provisions of the Clean Water Act*, 59 MD. L. REV. 1371, 1377 (2000) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)); *see also* Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 DICK. L. REV. 303, 304 (1996). Professor Simard states:

> Since the mid-1970s, however, the Court's attitude toward the standing doctrine has been increasingly restrictive. In a string of cases decided in the mid-1970s, the Court held that, to meet the requirements of standing, a litigant had to prove not only that she suffered an injury in fact, but also that her injury was caused by the defendant's conduct and could be redressed by the court . . . the adoption of the causation and redressability elements and the incorporation of separation of powers principles have broadened the reach of standing and made judicial review more restrictive.

Id.

25. *See, e.g.*, William Marks, Note, *Bond, Buckley, and the Boundaries of Separation of Powers Standing*, 67 VAND. L. REV. 505, 510 (2014) (noting that "standing 'relates in part . . . to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government'" (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring))).

26. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983); *see also* Erik R. Zimmerman, *Supplemental Standing for Severability*, 109 NW. U. L. REV. 285, 293 (2015). The standing doctrine is focused heavily on the concreteness of the alleged harm:

> [S]tanding doctrine is supposed to promote sound judicial decisions. The theory is that courts are best at deciding the types of concrete disputes that have traditionally been viewed as "cases" or "controversies." Courts also rely heavily on the presentations of the parties in the adversary system, and the injury in fact and causation requirements help to ensure that the parties have a sufficient stake in a dispute to frame the issues properly for the court.

Id. at 294.

27. Michael J. Teter, *Letting Congress Vote: Judicial Review of Arbitrary Legislative Inaction*, 87 S. CAL. L. REV. 1435, 1446 (2014).

28. *See id.* at 1446–47.

groups.[29] Whether through action or inaction, legislators can make it difficult, if not impossible, for politically powerless groups to effectuate change through the democratic process, which exposes many citizens to continuous, non-redressable harm.[30] Applying the standing doctrine in light of these realities concentrates, rather than separates, power at the federal level, and provides "a shield to allow the executive to violate the law, free from judicial scrutiny."[31] For this reason, judicial intervention is necessary both to protect individual liberty and to ensure that the courts do not "close their doors to individuals seeking justice."[32] Otherwise, citizens are left with rights but no remedies.

This article proposes that Article III standing should be conferred on a distinct class of litigants who can demonstrate the following:

1. The challenged law results in harm that cannot be addressed through the democratic and legislative process, and in-

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29. *See* Jeffrey G. Hamilton, Comment, *Deeper into the Political Thicket: Racial and Political Gerrymandering and the Supreme Court*, 43 EMORY L.J. 1519, 1545 (1994). Political and racial gerrymandering are widely seen as a way that the dominant political parties advance their interests:

> Political gerrymandering by its very nature is a partisan issue, but racial gerrymandering has ties to partisan politics as well. Both types of gerrymandering are used by the major political parties to advance their own interests. While racial gerrymandering has reasons behind it other than political ones, the marriage of gerrymandering and partisan politics is one of the most crucial issues involved in the debate over the propriety of using the gerrymander to rig election results. As a basic proposition, racial gerrymandering favors the Republican Party, and political gerrymandering favors the Democratic Party. This has produced some very strange bedfellows.

Id.

30. *See, e.g.*, Christopher J. Roederer, *Democracy and Tort Law in America: The Counter-Revolution*, 110 W. VA. L. REV. 647, 665–66 (2008). One study on the effectiveness of democracy concluded as follows:

> [The] privileged participate more than others and are increasingly well organized to press their demands on government. Public officials, in turn, are much more responsive to the privileged than to average citizens and the least affluent. Citizens with lower or moderate incomes speak with a whisper that is lost on the ears of inattentive government officials, while the advantaged roar with a clarity and consistency that policy-makers readily hear and routinely follow.

Id.

31. Robert A. Schapiro, *Judicial Federalism and the Challenges of State Constitutional Contestation*, 115 PENN ST. L. REV. 983, 1004 (2011).

32. Bowman, *supra* note 19, at 41 (quoting J. Skelly Wright, *No Matter How Small*, 58 MASS. L.Q. 9, 11 (1973)); *see also, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (invalidating a law banning sodomy between same-sex couples).

volves an area that is not within Congress's enumerated powers;

2. A *prima facie* showing that the law facially violates a fundamental constitutional right;[33] and

3. The alleged harm can be addressed by the Court in a manner that results in workable rules to guide lower courts, legislators, and other agencies of government.

Under the third prong, the Court would consider factors such as whether: (1) a litigant states a cognizable legal claim involving violations of a protected constitutional right; (2) the litigant is within the class of individuals that will suffer harm absent a legal remedy, (3) the harm is sufficiently direct in that it has already occurred or is reasonably likely to occur; (4) the issue presented is a question of law, is not within Congress's enumerated powers, and can be decided through the interpretation of legal texts.

Part II discusses the history and evolution of the standing doctrine and argues that the Court's jurisprudence has unwisely restrained the judiciary's ability to adjudicate constitutional questions where the coordinate branches, as a practical matter, cannot. Part III proposes a new standing framework that would broaden *and* narrow the class of litigants that could bring suit, while simultaneously respecting separation-of-powers principles by applying the abstention and political question doctrines.[34] Part III concludes by arguing that the standing doctrine should

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33. *See generally*, Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 350–51 (2004). Professor Siegel summarizes the "zone of interest" as follows:

> The requirement that a plaintiff be an intended beneficiary of legal requirements that he or she invokes also finds echoes in ordinary common law doctrines. For example, a violation of a contract may injure someone who is not a party to the contract. But such a person, even though injured, may not have a right to sue to enforce the contract; the person's right to sue turns on whether the person is an "intended" beneficiary of the contract or a mere "incidental" beneficiary. Similarly, a person who is injured as the result of a statutory violation may attempt to recover by bringing an ordinary tort action, but whether a court will determine that the statutory violation constitutes negligent conduct will turn on whether the statute was intended to protect persons like the plaintiff from the kind of harm that resulted from the statute's violation.

Id. at 351.

34. *See* Tracy Rottner Yu, Note, *"Standing" in a Quagmire: Raines v. Byrd*, 117 S. Ct. 2312 (1997), 67 U. CIN. L. REV. 639, 648–49 (1999) (noting that judicial review is not appropriate where there exists a "textually demonstrable constitutional commitment of

not be applied where the purposes underlying its application are not furthered, and where the practical result leaves citizens with abstract, not concrete rights.

II. ARTICLE III STANDING

Article III of the United States Constitution limits judicial review to "cases and controversies," although it does not establish threshold requirements that litigants must satisfy to have standing in the federal courts.[35] Importantly, the standing doctrine is not rooted in Article III, but instead has evolved over the years through the Court's jurisprudence.[36] The doctrine consists of (1) constitutional; and (2) prudential standing,[37]both of which have been used to restrict citizens' access to the courts.[38]

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the issue to a coordinate political department" (quoting Baker v. Carr, 369 U.S. 186, 217 (1986))).

35. *See* U.S. CONST., art. III, §2, cl. 1. Article III provides in relevant part as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States;–between Citizens of the same State claiming Lands under grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

36. *See* F. Andrew Hessick, *Standing in Diversity,* 65 ALA. L. REV. 417, 419–21 (2013) (discussing the development of the standing doctrine).

37. *See* Kelly Knoll, Note, *Confusion Likely: Standing Requirements for Legal Representatives Under the Lanham Act*, 115 COLUM. L. REV. 983, 993–94 (2015) ("[O]ur standing jurisprudence contains two strands: Article III standing, which enforces the Constitution's case-or-controversy requirement; and prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction.") (internal quotations omitted).

38. *See* Karl S. Coplan, *Ideological Plaintiffs, Administrative Lawmaking, Standing, and the Petition Clause,* 61 ME. L. REV. 377, 425 (2009) ("While the Court has not repeated this extra-constitutional rationale for limited standing, one cannot help get the sense that docket control in the broad sense of the term is part of the judicial reluctance to give broad access to federal courts.").

A. Constitutional Standing

Although the standing doctrine has existed for many years, the Court's interpretation of standing has evolved significantly.[39] For many years, federal courts resolved standing issues based not upon the threshold question of justiciability, but on the *merits* of a litigant's case.[40] As a result, litigants asserting a cognizable legal claim, whether rooted in common law or statute, had standing to challenge a law or seek recovery for cognizable legal harms.[41]

However, in the New Deal era, "the desire for a 'more pervasive constitutional oversight' of administrative authority,"[42] and the advent of "more 'ethereal claims' than those at common law . . . led federal courts to entertain cases without looking to the sort of legal interest sufficient to support a traditional cause of action."[43] These developments led courts to view standing independently from the merits,[44] which severed "the connection between standing and the [underlying] cause of action."[45] This development enabled the Court to "broaden the role of federal courts as well as to restrict it,"[46] and subsequent decisions confirmed that the Court viewed the standing doctrine as a way to "limit the use of the federal courts to attack regulation."[47] In *Ass'n of Data Processing Ser-*

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39. *See* Craig A. Stern, *Another Sign from Hein: Does the Generalized Grievance Fail a Constitutional or A Prudential Test of Federal Standing to Sue*, 12 LEWIS & CLARK L. REV. 1169, 1176 (2008).

40. *See id.* (stating that "standing was not so much a matter of the constitutional limits upon what cases were justiciable; it was rather a matter of the merits of the claim"). Standing also "requires that claimants of statutory or constitutional rights arguably be within the zone-of-interest created by the cited statutory or constitutional provision." *Id.* at 1199–2000.

41. *See id.* at 1174. One commentator summarizes the evolution of the standing doctrine as follows:

> For most of American history under the Constitution, standing was simply a question of whether a plaintiff had a cause of action, testing thereby the relation of the party to meritorious claims . . . . Standing existed for the party with a legal interest or legal right to lay before the court, an interest or right granted or secured by common law, Constitution, or statute. Standing, then, fundamentally entailed no inquiry apart from the merits.

Id. at 1176.

42. *Id.* at 1177 (quoting Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 Cal. L. Rev. 1915, 1920–21 (1986)).

43. *Id.*

44. *See id.* at 1178.

45. *Id.* at 1179.

46. *Id.*

47. *Id.* at 1178; *see also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 148–74 (1951) (Frankfurter, J., concurring).

vice Organizations, Inc. v. Camp,[48] the Court held that suits could only be brought by litigants who suffered an injury-in-fact, not merely those who had a legal interest in the outcome.[49] This required a litigant to suffer a "concrete and particularized"[50] injury amounting to "personal and tangible harm,"[51] and to be within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[52] Additionally, in some cases, the Court "insisted upon 'judicially cognizable injury' rather than simply any injury-in-fact,"[53] meaning that the injury must result from "a violation of legal right triggering a judicial remedy."[54]

Accordingly, litigants cannot base injuries-in-fact on "a disagreement, however sharp and acrimonious,"[55] or on harm that is speculative, indirect, or conjectural.[56] Furthermore, injuries-in-fact are not present where a litigant seeks adjudication of a question better suited to resolu-

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48. Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970).

49. *See id.* at 158, 153 n.1, 158.

50. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992); *see also* Ryan Guilds, Comment, *A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access*, 74 N.C. L. REV. 1863, 1867 (1996). In *Lujan*, Justice Kennedy stated:

> While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.

Lujan, 504 U.S. at 581.

51. Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013); *see also* Stern, *supra* note 39, at 1180.

> When the common law cause of action defined standing, standing allowed access to the court to anyone with a legal interest to vindicate, an interest that had suffered some injury. Such injury is known as a legal wrong because it was injury for which the law granted a remedy. But injury might be taken to mean something else. It might mean harm, some setback or hurt, apart from whether that harm triggers a cause of action, a remedy at law. To decide that standing could be satisfied by such harm, an injury-in-fact, would significantly enlarge standing beyond the test of legal interest.

Id.

52. *Ass'n of Data Process Serv. Orgs., Inc.*, 397 U.S. at 153.

53. Stern, *supra* note 39, at 1184.

54. *Id.*

55. *Id.* (quoting Diamond v. Charles, 476 U.S. 54, 62 (1986)).

56. *See* Elizabeth T. Isaacs, Comment, *Exposure Without Redress: A Proposed Remedial Tool for the Victims Who Were Set Aside*, 67 OKLA. L. REV. 519, 523–25 (2015).

tion by the legislature,[57] advisory opinions,[58] or "if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[59] Moreover, a subjective allegation that a law chills constitutionally protected conduct is not an "adequate substitute for a claim of specific present objective harm or a threat of specific future harm."[60] Finally, a litigant must also show that the defendant caused the injury, and that the damages can be redressed by the courts.[61]

B. Prudential Standing

The Court also relies on pragmatic considerations to restrict access to courts. One of the most common—and widely debated—limitations is the generalized grievance doctrine.[62] This doctrine blocks litigants from bringing suit where the alleged injury "is plainly undifferentiated and 'common to all members of the public.'"[63] Instead, citizens must demonstrate that they have "sustained or [are] immediately in danger of sustaining a direct injury as the result of [executive or legislative] action,"[64] which requires more than "merely a general interest common to all members of the public."[65] Thus, as the number of citizens who are

57. *See generally* Massachusetts v. EPA, 549 U.S. 497 (2007).

58. Flast v. Cohen, 392 U.S. 83, 96 (1968) (stating that "it is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions'" (quoting C. WRIGHT, FEDERAL COURTS 34 (1963))).

59. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 170 (2000).

60. Laird v. Tatum, 408 U.S. 1, 13–14 (1972).

61. Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013) (stating that the injury must be "fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision"); *see also Massachusetts*, 549 U.S. at 517 (holding that a litigant "must demonstrate that it has suffered a concrete and particularized injury . . . and that it is likely that a favorable decision will redress that injury"); Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997) (holding that "the standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance").

62. *See* Warth v. Seldin, 422 U.S. 490, 501 (1975) (describing the "generalized grievance" doctrine); *see also* Alex Hemmer, Note, *Civil Servant Suits,* 124 YALE L. J. 758, 784 (2014) (stating that "[b]oth the nature of this rule and its exact metes and bounds are far from clear").

63. Lujan v. Defs. of Wildlife, 504 U.S. 555, 575 (1992) (quoting United States v. Richardson, 418 U.S. 166, 176–77 (1974)).

64. Ex Parte Levitt, 302 U.S. 633, 636 (1937) (per curiam).

65. Kimberly N. Brown, *Justiciable Generalized Grievances*, 68 MD. L. REV. 221, 238–40 (2008) (discussing the generalized grievance doctrine and stating that that "certain wrongful government action—such as that which 'affects "all who breathe"'—will get its fair consideration, but only 'in the normal political process,' not in the courts"); *see also Lujan*, 504 U.S. at 573–74. In *Lujan*, the Court stated as follows:

injured by a law increases, the likelihood of challenging that law decreases.[66]

In a number of cases, the Court has applied the generalized grievance doctrine to reject "citizen-standing," which is based on citizens' asserted right to "require that the Government be administered according to law and that the public moneys be not wasted."[67] For example, litigants may not challenge "the generic validity of a constitutional amendment in court."[68] Likewise, citizens may not sue in their capacity as taxpayers because the "interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and . . . is essentially a matter of public and not of individual concern."[69]

However, the Court has permitted litigants to bring suit in various contexts where standing might not otherwise exist—and where the Court could have applied the generalized grievance doctrine to preclude litigants from bringing suit.[70] The doctrinal inconsistencies in the Court's standing jurisprudence demonstrate that a departure from traditional standing requirements in a discrete class of cases is necessary and warranted.

C. *Context-Specific Standing*

In several cases, the Court applies the traditional standing requirements differently depending on the nature and type of the alleged harm. For example, the Court has held that litigants have standing despite prospective harm, including where: (1) a law "chills" constitutionally protected conduct; (2) there exists an objectively reasonable fear of future

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> We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Id.; *see also Warth*, 422 U.S. at 499 (stating that a litigant "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"); Tileston v. Ullman, 318 U.S. 44, 46 (1943).

66. *See* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 508 (2008) (noting that "mere numerosity creates a standing problem"); *but see* Fed. Election Comm'n v. Akins, 524 U.S. 11, 24 (1998) (holding that standing can, in some circumstances, be found where an injury "is concrete, though widely shared" (citing Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 449–50 (1989))).

67. Brown, *supra* note 65, at 239–40 (stating that citizens have no standing to sue based "merely [on] concern over whether the executive branch is adhering to the law").

68. *Id.* at 240 (citing Fairchild v. Hughes, 258 U.S. 126, 129–30 (1922)).

69. Massachusetts v. Mellon, 262 U.S. 447, 487 (1923).

70. *See generally* Guilds, *supra* note 50 (explaining generally the effect of the generalized grievance doctrine on litigants' ability to access the courts).

harm; (3) a litigant is within the class of individuals harmed by the challenged law; and (4) redress through the legislature is not available.[71]

1. Standing Despite *Prospective* Harm

a. Prospective Harm from Laws that "Chill" Constitutionally-Protected Conduct

In a limited number of cases, the Court has found standing based on the fact that a law "chills" constitutionally protected conduct. In *Laird v. Tatum*,[72] the Court held that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that *fall short of a direct prohibition against the exercise of First Amendment rights.*"[73] In such cases, the challenged law was "regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or *prospectively subject* to the regulations, proscriptions, or compulsions that he was challenging."[74] Accordingly, where a citizen's conduct is "regulated, constrained, or compelled directly by the government's actions, instead of by his or her own subjective chill,"[75] standing to sue suit likely exists. Consequently, the injury-in-fact requirement was satisfied despite the fact that the alleged harm was neither immediate nor strictly personal, as the litigant was merely within the *class* of individuals who were currently *or* prospectively would be harmed by the law. As a result, *Laird* suggests that the Court may place less emphasis on the immediacy of the harm where the law infringes settled constitutional rights.

b. Injury-in-Fact Based on Objectively Reasonable Fear of Harm

In some cases, reasonable fear of *anticipated* harm can be a sufficient to find an injury-in-fact.[76] A plaintiff need only show a "well-founded or reasonable fear of prosecution under the statute to meet the injury prong of a standing analysis."[77] For example, in *Babbitt v. United Farm Workers National Union*,[78] the Court held that allegations of "an

71. *See, e.g.*, Riegle v. Fed. Open Mkt. Comm., 656 F.2d 873, 882 (D.C. Cir. 1981), *overruled on other grounds by* Melcher v. Fed. Open Mkt. Comm., 836 F.2d 561 (D.C. Cir. 1987).

72. Laird v. Tatum, 408 U.S. 1, (1972).

73. *Id.* at 11 (emphasis added).

74. *Id.* (emphasis in original).

75. Am. Civil Liberties Union v. Nat'l Sec. Agency, 493 F.3d 644, 661 (1977).

76. *See* Brian Calabrese, Note, *Fear-Based Standing: Cognizing Injury-in-Fact*, 68 WASH. & LEE L. REV. 1445, 1460 (2011) (stating that "[f]ear also has a role in an injury-in-fact analysis for standing in pre-enforcement challenges to the constitutionality of statutes").

77. *Id.*

78. Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979)

intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a *credible threat* of prosecution thereunder," are sufficient to confer standing.[79] Additionally, in *City of Los Angeles v. Lyons*,[80] the Court concluded that "[c]ognizable injury-in-fact exists when there is reasonable fear and objective evidence that supports the existence of this fear."[81] Similarly, in *Massachusetts v. EPA*,[82] the Court held that the plaintiffs (state and local governments) had standing to challenge the Environmental Protection Agency's denial of a petition that advocated for a rule regulating the emissions of carbon monoxide and greenhouse gases.[83] The majority in *Massachusetts* found that, although the alleged harm "hints at the environmental damage yet to come,"[84] it resulted from concerns regarding climate change, which "are serious and well recognized."[85]

The Court's holdings support the proposition that "harm can be cognizable when it begins to be feared, even if this occurs before it is imminent,"[86] and can be predicated on *inaction* by the government, particularly where redressability through the political process is not possi-

79. *Id.* at 298; *see also* Calabrese, *supra* note 76, at 1461 (discussing Babbitt, in which the Court held that a litigant "should not be required to undergo criminal prosecution as the sole means of seeking relief") (internal citations and quotations omitted); *see also Laird,* 408 U.S. at 13–14.

80. City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

81. Calabrese, *supra* note 76, at 1471.

82. Massachusetts v. EPA, 549 U.S. 497 (2007).

83. *See id.* at 526.

84. *Id.* at 521–22 (finding that, because Massachusetts "owns a substantial portion of the state's coastal property . . . it has alleged a particularized injury in its capacity as a landowner").

85. *Id.* at 521 (holding that the EPA's denial, and the effects of climate change, had "already inflicted significant harms, including 'the global retreat of mountain glaciers, reduction in snow-cover extent . . . [and] the accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years'") (internal citations omitted); *see also* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688–90 (1973) (conferring standing on private plaintiffs for "economic, recreational and aesthetic harm[s]" even though the harm followed an "attenuated line of causation"); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 184 (2000) (explaining that "nothing was 'improbable' about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms"); John Treangen, Note, *Standing: Closing the Doors of Judicial Review Lujan v. National Wildlife Federation*, 36 S.D. L. REV. 136, 149 (1991).

86. Calabrese, *supra* note 76, at 1464–65 (stating that fear-based harm is an "exception carved out of the general imminent threat rule"); *but see* Mark Seidenfeld & Allie Akre, *Standing in the Wake of Statutes,* 57 ARIZ. L. REV. 745, 769–70 (2015) (criticizing the Court's "fuzzy reasonableness analysis, which is subjective in nature and gives little direction to lower courts," and arguing that the Court should examine whether the statutory purpose encompassed an "implicit congressional recognition" that Massachusetts had standing to sue).

ble.[87] In *Summers v. Earth Island Institute*,[88] Justice Breyer echoed these sentiments, stating that "a threat of future harm may be realistic even where the plaintiff cannot specify precise times, dates, and GPS coordinates."[89] Justice Breyer relied on the Court's holding in *Massachusetts,* even though the alleged harm resulting from the failure to regulate carbon monoxide and greenhouse gases "might not occur for several decades."[90] In other words, an alleged harm is not speculative or lacking concreteness merely because such harm may occur in the future.[91]

2. Process-Based Harms

In a few contexts, litigants may have standing despite the relatively generalized nature of the harm and their inability to prove that, but for the alleged harm, the litigants would have received a benefit.[92] In the affirmative action context, individuals can have standing without showing that they "would have obtained the benefit in question—a place in a medical school class or a government contract—but for the denial of equal protection."[93]

These decisions adopt a broader view of injury-in-fact that stems from "unequal competition or from unequal selection"[94] and embraces the notion that "classification as a *conceptual* process is itself a harm."[95]

87. Teter, *supra* note 27, at 1445–46 (stating that "arbitrary congressional inaction poses the same problems as arbitrary action").

88. Summers v. Earth Island Inst., 555 U.S. 488 (2009).

89. *Id.* at 506 (Breyer, J., dissenting).

90. *Id.*

91. *See id.* at 505 ("[W]here, as here, a plaintiff has *already* been subject to the injury it wishes to challenge, the Court has asked whether there is a *realistic likelihood* that the challenged future conduct will, in fact, recur and harm the plaintiff."); *see also* Bradford C. Mank, *Judge Posner's 'Practical' Theory of Standing: Closer to Justice Breyer's Approach to Standing Than to Justice Scalia's*, 50 HOUS. L. REV. 71, 117–18 (2012).

92. *See, e.g.*, David Flickinger, Note, *Standing in Racial Gerrymandering Cases*, 49 STAN. L. REV. 381, 396 (1997) (citing Adarand Constructors, Inc., v. Pena, 515 U.S. 200 (1995)); Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656 (1993); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280–81 n.14 (1978).

93. Flickinger, *supra* note 92, at 381.

94. *Id.*

95. *Id.* at 396 n.84 (emphasis added) (citing Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1465 (1988)). Professor Flickinger explains as follows:

> Neither line of cases concludes that classification is the harm, and neither has to do so. In the set-aside cases, discernible individuals are unable to compete on an equal basis for contracts; in the jury cases, individual jurors are removed from the venire by peremptory challenges. But as we have seen, no individual in the voting rights context is denied anything available to any other individual.

In the Sixth Amendment context, for example, the Court has found standing based solely on the *allegation* that the state engaged in discrimination when selecting a jury.[96] An important limitation in such cases is that the litigant must be within the class of individuals who are or *would be* harmed by the challenged law.[97] More importantly, these decisions demonstrate that the Court occasionally adopts a *process-based* view of standing and relies on the improper classification of *groups* as the source of an injury-in-fact. By not requiring litigants to show that they would have achieved a benefit absent the unconstitutional conduct—even in the face of relatively *generalized* harms—the Court adopted an abstract view of an injury-in-fact based on the mere existence of a constitutional violation.

3. Remedial (Equitable) Discretion

Some courts have relied on the "equitable discretion" doctrine to confer standing when redress through the legislature is unavailable. In *Riegle v. Federal Open Market Committee*,[98] the U.S. District Court for the District of Columbia held that "[w]hen a congressional plaintiff brings a suit involving circumstances in which *legislative redress is not available* or a private plaintiff would likely not qualify for standing, the court would be counseled . . . to hear the case."[99] Likewise, in *Vander Jagt*, the Court conferred standing on four Republican members of the House of Representatives because "the Democratic House leadership ha[d] successfully diluted the political power of Republican representatives, their voters, and residents of their districts."[100] In so holding, the Court emphasized that "our nation-with surprising consensus-has relied

> The whole point of Shaw I, its innovation over the vote dilution cases, is that no individual must personally show the denial of equal treatment . . . .

Id. at 396.

96. *See id.* (quoting Batson v. Kentucky, 476 U.S. 79, 85–86 (1986)); *see also* City of Los Angeles v. Lyons, 461 U.S. 95, 114, 122–23 (1983) (Marshall, J., dissenting) (noting that standing "has always depended on whether a plaintiff has a 'personal stake in the outcome of the controversy,' not on the 'precise nature of the relief sought'") (internal citations omitted).

97. *See, e.g.*, United States v. Hays, 515 U.S. 737, 739 (1995) (denying standing in a redistricting case because they [the plaintiffs] did not live "in the district that [was] the primary focus of their racial gerrymandering claim, and . . . [did] not otherwise demonstrate that they, personally, ha[d] been subjected to a racial classification").

98. Reigle v. Fed. Open Mkt. Comm., 656 F.2d 873, 882 (D.C. Cir. 1981).

99. *Id.* (emphasis added); *see also* Neals-Erik William Delker, *The House Three-Fifths Tax Rule: Majority Rule, the Framers' Intent, and the Judiciary's Role*, 100 DICK. L. REV. 341, 367 (1996).

100. Vander Jagt v. O'Neill, 699 F.2d 1166, 1170 (D.C. Cir. 1983).

on the judiciary to remedy longstanding flaws in the political system which impede equal participation in the governmental process."[101]

As such, elected representatives can have standing if their claims present "a cognizable, common law harm to a protected legal interest."[102] Likewise, in *Massachusetts,* which involved climate change, the Court held that the plaintiffs had standing to sue because "the global warming issue is fraught with free-rider problems, *making resort to the political branches problematic.*"[103]

D. The Current Status of the Standing Doctrine

As discussed below, the standing doctrine lacks cohesion, undermines, rather than furthers, separation-of-powers principles, and in some situations leaves politically powerless groups unable to enforce constitutional rights.

1. The Lack of Cohesive Standing Rules

The Court has acknowledged that the standing doctrine "cannot be reduced to a one-sentence or one-paragraph definition."[104] In fact, scholars have criticized the doctrine as "confused,"[105] and "neither obvious nor reducible to a clear and concise statement."[106] For example, in the taxpayer standing context, the Court's decisions have been described as "border[ing] on gibberish."[107] Others have argued that "there is no objective scale by which to measure whether a particular kind of injury is sufficiently concrete and significant to warrant invoking a judicial remedy."[108]

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101. *Id.*

102. David Weiner, Note, *The New Law of Legislative Standing*, 54 STAN. L. REV. 205, 217 (2001).

103. Elliott, *The Functions of Standing*, *supra* note 66, at 512 (emphasis added) (discussing Massachusetts v. EPA, 549 U.S. 497 (2007)). Chief Justice Roberts dissented, arguing that "[t]he very concept of global warming seems inconsistent with this particularization requirement. Global warming is a phenomenon "harmful to humanity at large," and that "the redress petitioners seek is focused no more on them than on the public generally—it is literally to change the atmosphere around the world." *Massachusetts,* 549 U.S. at 540–41.

104. Richard Albert, *The Constitutional Politics of the Establishment Clause*, 87 CHI.-KENT L. REV. 867, 878 (2012) (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 475 (1982)).

105. *Id.* (quoting Michael Abramowicz, *Beyong Balanced Budgets, Fourteenth Amendment Style*, 33 TULSA L.J. 561, 607 (1997).

106. *Id.*; *see also* Steven D. Smith, *Taxes, Conscience, and the Constitution*, 23 CONST. COMMENT. 365, 370 (2006).

107. Albert, *supra* note 104, at 878 (quoting Smith, *supra* note 106, at 370).

108. Seidenfeld & Akre, *supra* note 86, at 749–50.

Indeed, the doctrinal inconsistencies in the Court's standing jurisprudence are difficult to deny and relate to both injury-in-fact and redressability. In *Lyons*, for example, the Court eschewed a rigid application of the standing doctrine, but in *Massachusetts*, the Court based standing on largely prospective harm that resulted from agency inaction.[109] The Court has also relaxed its view of redressability in certain contexts. In *Vander Jagt,* the Court correctly held that congressional plaintiffs have standing to commence suit in cases where "*legislative redress is not available* or a private plaintiff would likely not qualify for standing."[110] If elected representatives have standing in such cases, why are citizens prohibited from challenging laws in similar circumstances, particularly where constitutional rights are implicated? The answer, of course, is that they should not be—although they are under the current standing framework.[111]

At the very least, the Court's jurisprudence supports a nuanced and process-oriented approach to standing that would balance deference to the coordinate branches with the recognition that judicial intervention is sometimes necessary to protect fundamental constitutional rights.[112] The standing doctrine should not be applied in a manner that renders courts "blind to what must be necessarily known to every intelligent person,"[113] and unsympathetic the realistic threat of future harm.[114] Achieving this objective depends in substantial part on acknowledging that the standing doctrine does not consistently advance the primary justification on which it rests—separation of powers.[115]

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109. *See* Massachusetts v. EPA, 549 U.S. 497, 534 (2007) (holding that the EPA "has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore 'arbitrary, capricious . . . or otherwise not in accordance with law'"); Calabrese, *supra* note 76, at 1471 (discussing the Court's decision in *Laidlaw* and stating that "harm can be cognizable when it begins to be feared, even if this occurs *before* it is imminent").

110. Delker, *supra* note 99, at 367 (discussing Riegle v. Fed. Open Mkt. Comm'n, 656 F.2d 873 (D.C. Cir. 1981)) (emphasis added).

111. *See, e.g.,* Stern, *supra* note 39, at 1184 (criticizing the injury-in-fact prong on the grounds that it "require[s] more certainty than that offered by the laws of elementary economics" and proof of harm that is "very likely to be redressed") (quoting Allen v. Wright, 468 U.S. 737, 758 (1984)).

112. *See generally* Timothy Sandefur, *In Defense of Substantive Due Process, Or the Promise of Lawful Rule,* 35 HARV. J.L. & PUB. POL'Y 283 (2012) (discussing the importance of substantive due process in guarding against arbitrary state action).

113. Summers v. Earth Island Inst., 555 U.S. 488, 510 (2009) (quoting *In re* Wo Lee, 26 F. 471, 475 (C.C.D. Cal. 1886) (internal quotations omitted).

114. *See id.* at 506.

115. *See* Shane Palmer, Comment, *No Legs to Stand On: Article III Injury and Official Proponents of State Voter Initiatives*, 62 UCLA L. REV. 1056, 1066 (2015) (stating that the standing doctrine "helps to prevent the courts from infringing on the constitutional domains of the legislative and executive branches").

In theory, by invoking the standing doctrine, courts relegate "many crucial decisions to the political processes,"[116] and defer to the coordinate branches' lawmaking power.[117] As Justice Scalia states, "standing is a crucial and inseparable element of [separation of powers] whose disregard will inevitably produce, as it has in the past few decades—an over judicialization of the process of self-governance."[118] Without the stand-

116. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974); *see, e.g.*, Ryan McManus, Note, *Sitting in Congress and Standing in Court: How Presidential Signing Statements Open the Door to Legislator Lawsuits,* 48 B.C. L. REV. 739, 745 (2007) (stating that the court "describe[s] standing as focused on limiting the federal courts to their proper role in a democratic society"); *see also* Elliott, *The Functions of Standing*, *supra* note 66, at 516 (explaining that the Court has relied on the standing doctrine to limit the judiciary's involvement "to cases possessing the requisite concrete adversity for judicial resolution, avoiding questions better answered by the political branches, and resisting Congress's effort to conscript the courts in its battles with the executive branch").

117. *See* Warth v. Seldin, 422 U.S. 490, 500 (1975); *see also* Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013) (explaining that, in light of the "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of [an] important dispute and to 'settle' it for the sake of convenience and efficiency") (quoting Raines v. Byrd, 521 U.S. 811, 820 (1997)); Lujan v. Defs. Of Wildlife, 504 U.S. 555, 576 ("Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive."). In *Lujan*, the Court stated:

> Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches.

Id.

118. Scalia, *supra* note 26, at 881; Brown, *supra* note 65, at 238–39; *see also* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1229 (1993); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 99 (2007). Professor Siegel explains as follows:

> An individual or minority group suffering injury from illegal action of the political branches of government needs the protection of the unelected and not politically accountable Judiciary, but the majority does not need protection from itself. The majority can take care of itself using majoritarian processes, and therefore majoritarian processes should determine not only the content of the laws but the degree of enforcement the laws receive, so long as only the rights of the majority are affected. If the government chooses to let a legal requirement lapse into desuetude, and the populace does not compel compliance through political pressure, that should be fine, so long as no one is distinctively injured. For the Judiciary to step in where the government perhaps acts illegally but injures no one, or where it injures so widespread a group of people that no one is distinctively injured (a "generalized grievance," in Supreme Court parlance), would, Justice Scalia maintains, put the Judiciary in a role it would

ing doctrine, the courts would have the power to "decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions."[119]

2. The Standing Doctrine Does Not Further Separation of Powers Principles

It is difficult to understand how separation-of-powers principles are furthered when the political process is not a realistic avenue by which litigants can remedy legally cognizable harms.[120] In such circumstances, this approach does not advance the separation of powers; it concentrates power in the legislative and executive branches, and it immunizes elected officials from the consequences of arbitrary conduct.[121] Consequently, in certain contexts, the judiciary, consistent with its Article III reviewing power,[122] should have to decide issues that Congress, for whatever rea-

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> probably not execute well. The Judiciary's insulation from political accountability, he says, renders it an appropriate body to protect individuals from the people but inappropriate to decide what is good for all the people.

Id.

119. *Lujan*, 504 U.S. at 500; *see also* Schlesinger, 418 U.S. at 222; Massachusetts v. Mellon, 262 U.S. 447, 488–89 (1923) (to decide cases involving generalized grievances "would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess"); Flickinger, *supra* note 92, at 387–88. Professor Flickinger described the purposes of standing as follows:

> First, they [standing requirements] limit judicial review. This often seems like an end in itself among members of the Rehnquist Court, and it is particularly attractive in cases, such as redistricting disputes, that concern the political process. Second, standing rules increase judicial efficiency by discouraging the filing of lawsuits by those with mere ideological interests . . . . Third, standing is said to improve judicial decisions by requiring the presence of plaintiffs with personal interests, who are likely to present the highest quality advocacy. Fourth, standing rules rest on a fairness principle that those who have insufficient interests in a controversy should not be allowed to enforce the rights of those who may have deliberately chosen not to assert them.

Id.

120. *See* Scalia, *supra* note 26, at 894 (stating that the goal of the standing doctrine is to prevent litigants from "remov[ing a] matter from the political process and plac[ing] it in the courts").

121. *See, e.g.*, Saul Zipkin, *Democratic Standing*, 26 J.L. & POL. 179, 228 (2011) (noting that "[s]tanding might also apply differently in constitutional and statutory contexts, either because courts should be more keen to avoid deciding constitutional issues, or, conversely, because the federal courts play a special role in enforcing the Constitution").

122. *See generally* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1906 (2015). Professor Metzger explains as follows:

son, cannot. After all, "the purpose of the judiciary is to correct unlawful conduct by the executive and legislature,"[123] and in doing so, "the judiciary does not impermissibly interfere with the function of those branches because those branches have no authority to engage in unlawful acts."[124]

The separation-of-powers justification is further undermined when one considers the fact that, where Congress creates standing via statute, the Court has permitted plaintiffs to sue who would otherwise satisfy the traditional requirements.[125] In *Lujan,* Justice Scalia stated:

> There is this much truth to the assertion that "procedural rights" are special: The person who has *been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.* Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.[126]

> Article III standing requirements do not justify judicial refusal to recognize a duty to supervise. In fact, recognition of such a duty to supervise could alleviate rather than intensify the standing concerns associated with systemic challenges. These concerns typically center on lack of the requisite injury or causation relationship, with the Court at times skeptical that the systemic problem caused the discrete or particular injuries plaintiffs assert. Yet if the injury at issue is being subjected to inadequately supervised governmental action, then systemic improvements in supervision would be directly correlated to the claimed injury. Moreover, recognition of a constitutional duty to supervise can help to establish that being subjected to inadequately supervised action is, on its own, a constitutionally cognizable harm.

Id.

123. F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 318 (2008).

124. *Id.*

125. *See* Seidenfeld & Akre, *supra* note 86, at 762, 768 (stating that "congressional creation of general procedural rights, without more, can affect the judicial inquiry into standing," and that Congress's "superior institutional capacity to recognize harms and, relatedly, the procedures warranted to protect against those harms"); *see also* Brown, *supra* note 65, at 244 (stating that Congress often creates standing via statute and authorizes citizen suits "as a supplement to the executive's enforcement apparatus").

126. Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 n.7 (1992) (emphasis added); *see also* Seidenfeld & Akre, *supra* note 86, at 774 ("[T]he concreteness of likely harms and the causal chains between statutory violations and those harms . . . .").

3. The Standing Doctrine Harms Politically Powerless Groups

The primary inquiry in standing cases is whether the litigant "presents a controversy that for structural reasons [the Court] think[s] is better resolved in the political branches."[127] The Court has interpreted this principle in a manner that roots standing "immovably in the text of Article III"[128] and imposes rigid criteria without accounting for legislative inertia or partisan entrenchment.[129] Moreover, as stated above, the Court has relied largely on separation-of-powers principles without explaining in depth why judicial review would compromise the coordinate branches' lawmaking powers.

Unfortunately, this approach has led courts to apply the standing doctrine in a manner that harms politically powerless groups *and* that compromises the Court's role in protecting fundamental rights. As one court has noted:

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127. Elliott, *The Functions of Standing*, *supra* note 66, at 486. Professor Elliott explains:

> As a means of pursuing the general pro-democracy goal, then, standing proves a poor tool. It may well be worthwhile to dismiss cases involving generalized grievances, because plaintiffs in those cases have no common-sense stake beyond that any of us has and thus might properly be channeled away from the courts and into the political process. The problem is that the benefit of the doctrine here is nugatory: "It is never hard to find an adequately Hohfeldian plaintiff to raise the issues." Thus, standing may find the few true negatives—cases where standing does not exist—but it will also allow many false positives—cases where standing exists, yet under the pro-democracy tenet should be resolved by the political branches, not the courts.

Id. (quoting Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1305 (1976)).

128. *Id.* at 515.

129. *See*, e.g., Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1434–35 (2008). The judiciary's role, in part, is to address issues that cannot be resolved through the political process due to self-interested and entrenched majorities:

> The Framers were particularly attuned to the connection between tyranny and the organization of power; indeed, as Madison declared, the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Constitution provided the solution to the problem of tyranny by establishing institutions and processes that have as their organizing theme the disentrenchment of power. A host of mechanisms, including the separation of powers, bicameralism, and federalism serve to disperse and disentrench governmental power.

Id. (quoting THE FEDERALIST NO. 47, at 269 (James Madison) (Clinton Rossiter ed., 1999).

> It would be far better . . . for . . . great social and political problems to be resolved in the political arena by other branches of government. But these are social and political problems which seem at times to defy such resolution. In such situations, under our system, the judiciary must bear a hand and accept its responsibility to assist in the solution where constitutional rights hang in the balance.[130]

Indeed, courts stand as guardians of constitutional rights and possess both the authority and independence to redress harms that result from arbitrary laws:

> [M]any issues will not be addressed by the political branches *because* largenumbers of people are harmed but only minimally; environmental problems, for example, are frequently characterized by widespread but mild injuries that are unlikely to lead to political mobilization. Precisely because the courts are less democratic than the executive and legislative branches, they should make sure not to *worsen* the antidemocratic aspects of the political branches.[131]

Simply put, the standing doctrine is "ill-suited to the functions it has been asked to serve,"[132] and creates a governance structure that "systematically favor[s] the powerful over the powerless."[133] As one scholar explains, "the anti-democratic critique rings hollow when those whose interests are most at stake in the enforcement of socio-economic rights (typically people of limited means) lack equal or meaningful access to democratic processes."[134]

Some might argue that the Court's approach to statutory standing is consistent with the separation-of-powers argument because it reflects deference to Congress's judgment.[135] But if the Court is willing to allow Congress to confer standing where it would not otherwise exist, why did the Court invalidate the Voting Rights Act in *Shelby County* when the

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130. Hobson v. Hanson, 269 F. Supp. 401, 517 (D.D.C. 1967).

131. Heather Elliott, *The Misfit Between the Standing Doctrine and Its Purposes*, 34-SPG ADMIN. & REG. L. NEWS 13, 14 (2009) [hereinafter Elliott, *The Misfit Between*].

132. *Id.*

133. Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304 (2002).

134. Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 937 (2011).

135. *See, e.g.*, Mank, *supra* note 91, at 107–108 (summarizing Justice Scalia's defense of the standing doctrine on separation of powers grounds).

Senate voted 98-0 in favor of re-authorization? Justice Scalia suggested, perhaps correctly, that Congress was institutionally incapable of resolving the issue, and such incapability *necessitates* judicial intervention.[136] Put differently, it is not inconsistent to defer to Congress's decision to create standing, and to *grant* standing where Congress is institutionally incapable of providing a remedy. Doing so preserves the Court's role as an independent check on the coordinate branches and protects politically powerless groups who would otherwise have no means by which to enforce constitutional rights.

Consequently, in circumstances where redress through the legislature is not available, and where the plaintiff is within the class of individuals who are or who will be harmed by the challenged law, courts should intervene. Judicial intervention in these circumstances would not lead to charges of overreaching because concerns regarding separation of powers are virtually non-existent. Rather, judicial intervention in this context would be consistent with the courts' authority to say "what the law is" when the coordinate branches cannot, and to protect constitutional rights from arbitrary laws.[137] Additionally, concerns regarding separation of powers do not arise in the context of whether a *litigant* can satisfy traditional standing requirements.[138] Instead, such issues arise concerning "the substantive *issues* the individual seeks to have adjudicated,"[139] including whether "the dispute sought to be adjudicated will be presented . . . in a form historically viewed as capable of judicial resolution."[140] As such, the Court should place substantial weight on the suitability and workability of resolving a specific issue through the judicial rather than the legislative process. In doing so, the Court should, at least in some cases, place less emphasis on whether a litigant has strictly satisfied the traditional standing requirements. This would more appropriately balance the judiciary's power to correct constitutional wrongs with the legislature's lawmaking power and avoid deferring to the legislative process when it would result in substantial harm to politically powerless groups.

Currently, however, although the Court has displayed a willingness in some circumstances to relax the traditional standing requirements, it has not set forth a coherent framework that would guide lower courts on when a departure from the injury-in-fact and redressability would be warranted. For example, in *Massachusetts* the Court "relax[ed] the re-

136. *See, e.g.*, Transcript of Oral Argument, *supra* note 15, at 47–48.

137. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) (holding that the judiciary has the power to "say what the law is").

138. *See* Simard, *supra* note 24, at 312 (quoting Flast v. Cohen, 392 U.S. 83, 99–101 (1968)).

139. *Id.* at 313 (emphasis added).

140. *Id.* at 313–14.

dressability standard in an unspecified manner not tied in any logical way to the procedural right it found in the statute [conferring standing]."[141] Put simply, "what remains ambiguous is the degree to which the redressability and immediacy requirements are relaxed,"[142] and what remains invisible is any workable test to determine the circumstances under which these requirements *should* be relaxed.[143]

III. BACK TO *SHELBY COUNTY*: A PRAGMATIC STANDING TEST

In some circumstances, the standing doctrine strips the courts of their role as guardians of constitutional freedoms, particularly for politically powerless and traditionally disadvantaged groups. One scholar explains as follows:

> [T]he Constitution protects the minority from undesired governmental acts, but if enforcement is relegated to the political process, representative bodies will condone unconstitutional actions whenever a majority of voters favor them. The very purpose of a constitution is to protect fundamental principles from the political process. This purpose is frustrated when constitutional questions are left to the majority.[144]

Thus, when faced with arbitrary legislative action or inaction, judicial intervention "is not only appropriate but essential" to protect citizens' constitutional rights.[145] In other words, the Court can—and should—have a meaningful role in resolving constitutional questions when, as Justice Scalia stated in *Shelby County*, elected officials lack the political will to do so. When the Court applies the standing doctrine, regardless of legislative inertia or entrenchment,[146] some citizens are left with rights without remedies and a government that is neither unaccountable nor responsive to its citizens.[147]

In *Shelby County,* Justice Scalia cited a deficiency in the political process as a reason to eschew deference to Congress, and this may have been the reason why the Court invalidates portions of the Voting Rights

141. Seidenfeld & Akre, *supra* note 86, at 766.

142. *Id.* at 764.

143. Elliott, *The Functions of Standing*, *supra* note 66, at 483–485.

144. Dana S. Treister, Note, *Standing to Sue the Government: Are Separation of Powers Principles Really Being Served?*, 67 S. CAL. L. REV. 689, 708 (1994).

145. Sonja Ralston Elder, Note, *Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 DUKE L.J. 755, 767 (2006) (quoting Londonderry School Dist. SAU No. 12 v. State, 907 A.2d 988, 996 (N.H. 2006)).

146. *See* Dawood, *supra* note 129, at 1435–36.

147. *See* Treister, *supra* note 144, at 691 (stating that "[w]hen citizens accuse the government of not enforcing the law, courts should serve as neutral arbitrators to protect the rights of citizens because such claims are not adequately remedied by the political process").

Act despite overwhelming support for re-authorization. Noting that "they [Senators] are going to lose votes if they do not reenact the Voting Rights Act,"[148] and suggesting that the Act would be "reenacted in perpetuity unless . . . unless a court can say it does not comport with the Constitution,"[149] Justice Scalia recognized the *necessity* for judicial intervention in this situation.[150] The same principle should be applied when politically powerless citizens challenge a law's constitutionality, yet discover that redress through the democratic process is nothing but an exercise in futility. When citizens, who are within the class of individuals that will be subject to the harm and have no recourse through the legislative process, have asserted a legally cognizable harm, denying such citizens standing will risk making the arbitrary acts of government immune to challenge—and insulate elected representatives from accountability.[151]

In other words, deferring to the legislative process as a matter of course disregards the fact that elected representatives can make it difficult, if not impossible, to change laws that violate constitutional protections:

> The major obstacle in addressing allegedly unconstitutional acts through the political process is that system's frequent ineffectiveness. In theory, elected officials, responsible to their constituents, will lose their office if they act illegally or in a fashion contrary to the will of the majority; in practice, this democratic ideal often goes unrealized. Elected representatives are rarely receptive to citizens' allegations of unlawful conduct. In fact, when citizens assert unconstitutional conduct, the government often presents a vigorous defense of its actions. Thus, even with a perfectly functioning political process,

148. Transcript of Oral Argument, *supra* note 15, at 48.

149. *Id.* Justice Scalia further stated:

> This Court doesn't like to get involved in—in racial questions such as this one. It's something that can be left—left to Congress. The problem here, however, is suggested by the comment I made earlier, that the initial enactment of this legislation in a—in a time when the need for it was so much more abundantly clear was—in the Senate, there—it was double-digits against it. And that was only a 5-year term. Then, it is reenacted 5 years later, again for a 5-year term. Double-digits against it in the Senate. Then it was reenacted for 7 years. Single digits against it. Then enacted for 25 years . . . . And this last enactment, not a single vote in the Senate against it. And the House is pretty much the same. Now, I don't think that's attributable to the fact that it is so much clearer now that we need this.

Id. at 46–47.

150. *See id.* at 47.

151. *See* Treister, *supra* note 144, at 691 (arguing that "the current doctrine creates a class of cases in which the government may violate the Constitution and laws with impunity").

> citizens would have to wait for an election to try and stem unlawful behavior.[152]

If the Court rigidly applies the standing doctrine in these situations, redressability in *any* branch of government is effectively foreclosed. For these reasons, the Court should strive "to determine in what circumstances, consonant with the character and proper functioning of the federal courts, such suits should be permitted."[153] To do so, the Court must develop a practical standing framework that accounts for these realities to avoid continuing injustices, promote greater accountability, *and* affirm the judiciary's role as a check on the coordinate branches' lawmaking power.[154]

A. A Three-Part Test Focusing on the Lack of Redressability in the Political Process

The first principle that should guide application of the standing doctrine is that it should be invoked in a manner that avoids the "potentially disastrous consequences of turning away the politically powerless in the name of democracy."[155] Indeed, holding that a matter is best resolved through the legislative process, without examining whether recourse is available through that process, "comes at the expense of the public

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152. *Id.* at 707–708 (internal citations omitted). The standing doctrine not only fails to promote the Court's role in enforcing individual rights; the doctrine fails to further the very principles used to justify its existence:

> Moreover, the Supreme Court's willingness to leave claims against the government to the political process is based on three false tions. First, separation of powers principles do not, as the Court suggests, dictate a reduced judicial role, rather they require active judicial review of governmental actions. Judicial review provides a check on the accumulation of inordinate power in any one branch. Second, plaintiffs who present generalized grievances cannot sufficiently remedy their claims through the political process. Their injuries are sufficiently concrete—even if shared with all citizens—to require protection by the courts. Third, the Court is wrong in suggesting that the antimajoritarian nature of the federal judiciary makes it incapable of ruling on generalized grievances. Once a court recognizes a plaintiff's objection to improper government behavior as an injury, it becomes clear that federal judges are well qualified to adjudicate these claims. Even if the court's role in such cases is viewed as enforcing the will of the majority, the judicial branch still provides plaintiffs with the most effective remedy.

Id. at 724–25.

153. Flast v. Cohen, 392 U.S. 83, 120 (1968)).

154. David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 824 (2004) ("Judicial interference with political decisions arises not from grants of standing but from orders issued correcting constitutional and statutory violations.").

155. Elliott, *The Functions of Standing*, *supra* note 66, at 516.

good . . . to promote private interests . . . [and] to serve their [legislators] own political interests."[156]

This article proposes a three-part test that will confer standing on individuals where: (1) an issue cannot realistically be resolved through the legislative process; (2) a litigant makes a *prima facie* showing that a law violates a fundamental constitutional right; and (3) the issue(s) enable courts to develop workable rules to guide lower courts, legislators, and law enforcement officials. This test would bring cohesiveness to the Court's standing jurisprudence and increase access to the courts without opening the floodgates to scores of new lawsuits or undermining separation-of-powers principles.

1. A Matter Cannot Be Resolved through the Legislative Process

There are several reasons why some issues cannot be resolved through the political process. The first is where, as Justice Scalia believed in *Shelby County*, it may be politically unpopular to do so.[157] In addition, individuals or groups may lack power or access to elected representatives.[158] In this situation, the standing doctrine's requirements, coupled with the generalized grievance rule, make access to the courts even more difficult.[159] To begin with, the generalized grievance rule places too much emphasis on numerosity. As Professor Elliott notes, "it is simply not the case that an issue affecting huge numbers of people will necessarily be addressed by the political branches, even if people would want it to be."[160] For example, in class-action lawsuits, where commonality of claims is a *prerequisite* to class certification,[161] injuries may be widespread and similar but are nonetheless direct, personal, and concrete to every member of that class.[162] As a result, the analysis should not turn

156. Teter, *supra* note 27, at 1445–46.

157. *See, e.g.*, Transcript of Oral Argument, *supra* note 15, at 47–48.

158. *See* Nichol, Jr., *supra* note 133, at 304.

159. *See* Mark Gabel, Note, *Generalized Grievances and Judicial Discretion*, 58 HASTINGS L.J. 1331, 1353 (2007) stating that "[g]rounding generalized grievances doctrine in Article III and separation of powers concerns, as the Court did in Lujan, restricts the ability of the federal courts to implement public values").

160. Elliott, *The Misfit Between*, *supra* note 131, at 14.

161. Wal-Mart Stores v. Dukes, 131 S. Ct. 2541, 2550–51 (2011) (stating that, to be certified as a class, plaintiffs must demonstrate that "there are questions of law or fact common to the class") (quoting FED. R. CIV. P. 23(a)(2)).

162. Elliott, *The Functions of Standing*, *supra* note 66, at 483. Professor Elliott explains as follows:

> If standing is meant to divert into the political branches problems better solved there, then its proper application should result in the dismissal of cases where large numbers of plaintiffs share the same injury. The problem is that this use

on the number of individuals harmed, but on whether the litigant is within the class of individuals who have *or* will be harmed, whether the harm is of the type that a statute or constitutional provision was designed to safeguard, and whether the legislature is unwilling or unable to remedy the alleged harm. Although standing ensures that the Court does not "trample on Congress's legislative prerogatives,"[163] it should not operate to preclude judicial intervention when "Congress is essentially unable to undertake these efforts."[164] In this way, the standing doctrine undermines, rather than strengthens, the democratic process, and diminishes, rather than increases, the avenues by which citizens can have a voice in governance.[165]

Finally, the traditional standing requirements can harm historically disadvantaged groups. As the Court noted in *United States v. Carolene Products,*[166] discrimination "against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[167] Stated differently, "[w]hen an identifiable social group has been consistently and significantly underrepresented or in other ways excluded from the legislative process, traditional political processes cannot be relied upon to protect that group."[168]

> [T]here is good reason to suspect that the standing doctrine has been used to exacerbate existing injustices. When invoking separation-of-powers concerns to deny justiciability, courts should be careful to maintain access for those who cannot expect a fair hearing from

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of standing does not make sense in the doctrine's own terms: the tripartite test asks whether a plaintiff has suffered injury in fact. If the plaintiff is, in fact, injured, it is irrelevant under that analysis whether many others share that same injury. Indeed, if one considers contemporary mass tort and class action cases, it becomes clear that federal courts must have jurisdiction over countless cases that involve widespread yet particularized harms.

Id.

163. *Id.* at 513.

164. Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 161 (2011) [hereinafter Elliott, *Congress's Inability*].

165. *See* Treister, *supra* note 144, at 708 (noting that "the Constitution protects the minority from undesired governmental acts, but if enforcement is relegated to the political process, representative bodies will condone unconstitutional actions whenever a majority of voters favor them").

166. United States v. Carolene Products Co., 304 U.S. 144 (1938).

167. *Id.* at 152 n.4.

168. Samuel Issacharoff, *Polarized Voting and the Political Process*, 90 MICH. L. REV. 1833, 1867 (1992) (quoting Guido Calabresi, *The Supreme Court, 1990 Term - Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 91 (1991)).

> the political branches. When invoking separation-of-powers concerns to deny justiciability, courts should be careful to maintain access for those who cannot expect a fair hearing from the political branches. After all, the ultimate purpose of our Constitution's separation of powers is to restrain arbitrary government action; it would be oxymoronic to deny standing to a plaintiff who cannot gain access to the political branches of government to redress arbitrary government action.[169]

For this reason, when a racial or ethnic group has "experienced a history of discrimination or must face a real danger of long-run exclusion,"[170] courts must intervene to guard the group from "unjustified selective treatment, that is, discrimination."[171] Absent judicial intervention, the standing doctrine will lead to the worsening of already-existing legal harms for disadvantaged and politically powerless groups.[172] Otherwise, "the power to trigger judicial review [will be] afforded most readily to those who have traditionally enjoyed the greatest access to the processes of democratic government."[173]

Several factors should be considered when determining if an issue is not amendable to resolution through the legislative process. These include, but are not limited to, the following circumstances:

- *Inaction.* The legislature has failed to act over a prolonged period of time despite credible evidence that a law infringes on protected constitutional freedoms;

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169. Elliott, *The Functions of Standing*, *supra* note 66, at 512–13.
170. Issacharoff, *supra* note 168, at 1867.
171. *Id.*
172. *See* Nichol, Jr., *supra* note 133, at 305. Professor Nichol states as follows:

> A standing doctrine that distorts constitutional litigation in favor of traditional bases of economic and social authority has little to commend itself. Such a standard abandons comprehensible justifications for judicial intervention. It excludes participants who already are often marginalized in the operations of other branches of government. And, ironically, it fashions new tools to sustain and augment inequality in a society that has allowed many of its central egalitarian aspirations to fade from national concern. Standing law is not only unsuccessful; it is demonstrably harmful. In theory, as the Court has told us, the Article III injury requirement assures the "proper—and properly limited—role" of the federal courts in our system of government. In fact, however, the injury standard has taken the federal courts down a path that is all but indefensible.

Id.
173. *Id.* at 333.

- *Disproportionate Harm.* The law in question disproportionately affects politically powerless and disadvantaged groups;

- *Institutional Entrenchment.* The legislature is dominated by one political party that is unlikely or unwilling to make policy changes;

- *Impracticality.* Elected representatives are reticent to address an issue due to actual or perceived political fallout (as suggested during oral argument by *Shelby County*).[174]

By applying these factors, the Court can relax its standing requirements in a narrow class of cases on the basis of necessity and utility. The purpose is to ensure that cases are not dismissed for "'democratic reasons' when the democratic branches are, in fact, unavailable to the plaintiff."[175] In this way, the Court can avoid applying the standing doctrine in a manner that "systematically favor[s] the powerful over the powerless,"[176] and create a system that promotes the rule of law, accountability, and equality.

2. A Litigant Makes a *Prima Facie* Showing that a Law Facially Violates a Constitutional Right

Where, on the basis of a complaint, a litigant makes a *prima facie* showing that a law violates a constitutional right, the Court should be more willing to find standing, provided the litigant satisfies the non-redressability and judicial suitability prongs. In *Carolene Products*, the Court held that "there may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."[177] As Professor Elliott notes in discussing *Carolene Products*, "the Court emphasized its role in assuring that those who are marginalized are not trampled on by the majority."[178]

The Court has, at least in some cases, recognized that protection of minority rights is a part of the judiciary's role. For example, the Court has conferred standing in racial gerrymandering cases to invalidate redis-

174. *See, e.g.*, Transcript of Oral Argument, *supra* note 15, 47–48.
175. Elliott, *The Functions of Standing*, *supra* note 66, at 516.
176. Nichol, Jr., *supra* note 133, at 304.
177. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
178. Elliott, *The Misfit Between*, *supra* note 131, at 14.

tricting plans that infringe on the fundamental right to vote.[179] It has done so despite the fact that "a harm is difficult to apply to any one individual,"[180] and "[t]he mere placement of an individual in one district instead of another denies no one a right or benefit provided to others,"[181] In *Shaw v. Reno,*[182] the Court articulated a principle of *representational* harm by holding that the redistricting plan was "so extremely irregular on its face that it rationally [could] be viewed only as an effort to segregate the races for purposes of voting."[183] In *Miller v. Johnson,*[184] the Court held that a valid claim exists whenever race is "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."[185]

In these cases, the Court has emphasized the severity of the constitutional violation rather than the presence of concrete harm, noting that racially-motivated redistricting plans marginalize certain racial groups.[186] As one commentator notes, racially-motivated redistricting plans "threaten to undermine . . . representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole."[187] Additionally, such plans are inconsistent with elected representatives' "constitutionally-rooted obligation to work for the entire community,"[188] and be "accountable to a community identified by the 'constitutionally irrelevant criterion of race.'"[189]

At the same time, Court has not clarified whether the reasoning in *Miller* and *Shaw* may apply to other contexts. As former Supreme Court Justice David Souter stated in *Bush v. Vera,*[190] "a helpful statement of a

179. *See* Flickinger, *supra* note 92, at 382 ("[T]he use of race as the predominant factor in redistricting—even when used by the majority to provide additional minority representation—is unconstitutional unless narrowly tailored to further a compelling state interest.").

180. *Id.* (noting that the harm "is only incidentally about individuals").

181. *Id.* (quoting Shaw v. Reno, 509 U.S. 630, 681–82 (1993) (Souter, J., dissenting)).

182. Shaw v. Reno, 509 U.S. 630 (1993).

183. *Id.* at 642 (emphasis in original).

184. Miller v. Johnson, 515 U.S. 900 (1995).

185. *Id.* at 916.

186. *See* Flickinger, *supra* note 92 at 388 (citing City of Mobile v. Bolden, 446 U.S. 55 (1980); United Jewish Orgs. v. Carey, 430 U.S. 144 (1977)).

187. *See id.* at 394; *see also* Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, 'Fair Representation,' and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 533–34 (2003) (stating that racial gerrymandering "is said to 'corrupt politics,' for, in its worst form, it 'condemns political groups to permanent minority status almost regardless of their electoral strength or of changes in voter preferences'") (internal citation omitted).

188. *Id.* at 394 (quoting Emily Calhoun, *Shaw v. Reno: On the Borderline*, 65 U. Colo. L. Rev. 137, 141 (1993)) (internal quotations omitted).

189. *Id.* (quoting Calhoun, *supra* note 188, at 141).

190. Bush v. Vera, 517 U.S. 952 (1996).

Shaw claim still eludes this Court."[191] Significantly, however, before the Court decided *Shaw*, it "required evidence of substantial harm to an identifiable group of voters to justify any judicial displacement of these traditional districting principles."[192] After *Shaw,* the Court shifted its focus to the severity and pervasiveness of the constitutional deprivation:

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial block voting that majority-minority districting is sometimes said to counteract.[193]

Perhaps the most significant problem in cases involving racial gerrymandering is "is standing's redressability requirement."[194] If, as the Court suggested in *Shaw* and *Miller*, marginalization of minority voters constitutes the harm to be remedied, then such harm "exists in tension with the Voting Rights Act, the aim of which is to protect—and in many cases enhance—minority voting strength."[195] Therefore, "as long as the Voting Rights Act survives, legislatures must walk a fuzzy line between compliance with the statute and the treatment of race as the predominant consideration . . . [which] may be an unworkable distinction."[196] The concept of unworkability lies at the heart of why, in some situations, judicial intervention is necessary to *preserve* separation-of-powers principles, and to protect constitutional freedoms.[197] For this reason, deference to the legislature can, in some instances, contribute to arbitrary deprivations of constitutional freedoms.

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191. *Id.* at 1045 (Souter, J., dissenting).
192. *Id.* at 1050.
193. *Shaw*, 509 U.S. at 647–48.
194. Flickinger, *supra* note 92, at 402.
195. *Id.*
196. *Id.*
197. *See* generally Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Government Inaction*, 88 NOTRE DAME L. REV. 2217, 2217 (2013) (stating "the Framers were concerned with preventing arbitrary governmental action. Gridlock not only makes the arbitrary exercise of governmental power more likely, but also implicates a new concern: the problem of arbitrary inaction").

3. The Issue(s) Enable that the Court to Develop Workable Rules to Guide Lower Courts, Legislators, and other agencies of Government

Although the Court should be mindful of separation-of-powers principles, it should also focus on "offering clearer rules to the lower courts."[198] Importantly, "to provide clearer guidance for the lower courts, and more transparently realize the separation-of-powers functions it seeks to promote,"[199] the Court should focus on the necessity and utility of judicial intervention. A necessity-driven approach would involve a consideration of whether the coordinate branches, for reasons such as fear of voter disapproval, are unable to address matters that impact constitutionally-protected rights, and on whether the Court's intervention would yield a result that cannot be achieved legislatively.[200]

In conducting such an inquiry, the Court should consider whether workable rules can be developed to guide lower courts *and* ensure respect for the coordinate branches of government. This involve a consideration of several factors, including whether: (1) the issue(s) constitutes a question of law, and the resolution requires the interpretation of legal text; (2) the subject matter is within Congress's enumerated powers and therefore entrusted to the legislative process; (3) there is a reasonable likelihood that the harm is reasonably likely to occur and will continue occurring absent a legal remedy; and (4) the remedy (e.g., an injunction) is one that the Court is institutionally suited to providing. Such factors would avoid excessive judicial oversight over affairs properly left to the legislature and acknowledge that the courts have an important role in protecting constitutional rights and promoting a participatory democratic process.

At bottom, this proposal has several benefits that will mitigate the harsh and likely unintended consequences caused by applying the traditional standing requirements. Where elected representatives are unwilling to address controversial issues litigants, citizens will have the means by which to enforce constitutional rights and remedy legal harms. In doing so, the Court can clarify its standing jurisprudence, provide guidance to lower courts, and avoid the "uncertain and inconsistent application of the

198. *See* Elliott, *The Functions of Standing*, *supra* note 66, at 516–17 (emphasis added).

199. *Id.* at 459–60.

200. *See* Treister, *supra* note 144, at 707 (arguing that the problem with "addressing allegedly unconstitutional acts through the political process is that system's frequent ineffectiveness. In theory, elected officials, responsible to their constituents, will lose their office if they act illegally or in a fashion contrary to the will of the majority; in practice, this democratic ideal often goes unrealized") (internal citations omitted).

law among the regional courts of appeals and district courts."[201] Perhaps most importantly, courts would be required to examine whether there is a realistic possibility of redress through the legislative process, thus ensuring that citizens are not defenseless be against the potentially arbitrary exercise of government power and subject to a government that "systematically favor[s] the powerful over the powerless."[202]

B. Counterarguments

Some might criticize this approach to standing on the ground that it would enable the judiciary to intervene in matters that should be resolved through the democratic process.[203] This argument lacks merit because courts can use other methods, such as applying the abstention and political question doctrines, to defer to the legislature in appropriate cases.[204]

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201. Todd. J. Tiberi, Comment, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?* 54 U. PITT. L. REV. 861, 864, 867 (1993). Some scholars have advanced the concept of percolation, which advocates thorough consideration of issues in the federal courts leads to better decisions from the Supreme Court, despite the concern about "uncertain and inconsistent application of the law among the regional courts of appeals and district courts." Professor Fallon states as follows:

> [D]enying review of decisions that conflict with other decisions of Courts of Appeals . . . results in the federal law being enforced differently in different parts of the country. What is a crime, an unfair labor practice or an unreasonable search and seizure in one place is not a crime, unfair practice or illegal search in another jurisdiction. Or citizens in one circuit do not pay the same taxes that those in other circuits must pay. It may be that occasionally it would be of use to leave a conflict unresolved in order to await the views of other courts; but for the most part, the conflicts that we turn down are not in that category, and they invite prompt resolution in this Court, which now is the only forum that can provide nationwide uniformity.

Id. at 867 (quoting *Intercircuit Panel of the United States Act: Hearings on S.704 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 99th Cong.147–48 (1985) (statement of A. Leo Levin, quoting Justice Byron White).

202. Nichol, Jr., *supra* note 133, at 304.

203. *See* Michael J. Wray, *Still Standing? Citizen Suits, Justice Scalia's New Theory of Standing and the Decision in Steel Company v. Citizens For a Better Environment,* 8 S.C. ENVTL. L.J. 207, 214 (2000) (describing Justice Scalia's view of standing and explaining that "[i]n order to restrict courts to their traditional undemocratic role of protecting individuals and minorities from the majority's will, the standing doctrine, in Justice Scalia's opinion needed to be reformed to exclude the courts from the 'even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*'") (emphasis in original) (quoting Scalia, *supra* note 26, at 894).

204. *See* Siegel, *supra* note, 118, at 112.

> The political question doctrine keeps courts away from certain issues altogether. It is not just a question of fussing about the precise circumstances in which the courts can act. It represents a judgment that as to certain issues, our government will function best if the political branches operate without any judicial

As Professor Elliott notes, "[a]n abstention doctrine should also permit courts to consider the extent to which the case involves a question that is better resolved in the political branches,"[205] without the additional cost of preventing citizens from seeking judicial remedies.

Moreover, a slightly expanded application of the standing doctrine to a limited category of litigants (and cases) would *further* separation-of-powers principles because it would ensure that the judiciary acts as an independent check on the coordinate branches' lawmaking power. One commentator states as follows:

> By using judicial review to check the power of the executive branches, and by attempting to divine congressional intent . . . judges are exercising the role intended for the judiciary, that of insuring the legitimacy of the action of the legislative and executive branches. Furthermore, by reviewing executive action according to legislative intent, the courts keep the executive branch from encroaching upon the domain of the legislative branch. Thus, even in the more expansive view of judicial review, separation of powers plays a central role.[206]

> control at all. Of course, as to any particular issue, one might agree or disagree with that judgment, but plainly a purpose is served by freeing the political branches from judicial review in areas where judicial intervention would do more harm than good.

Id.

205. Elliott, *The Misfit Between*, *supra* note 131, at 14; *see also* Richard H. Fallon, Jr., *Why Abstention is Not Illegitimate: An Essay on the Distinction Between 'Legitimate' and 'Illegitimate' Statutory Interpretation and Judicial Lawmaking*, 107 NW. U. L. REV. 847, 848–49 (2013). The most frequently cited abstention doctrines are Pullman and Younger Abstention. Professor Fallon describes these doctrines as follows:

> Under Pullman, federal courts will initially decline to exercise jurisdiction over cases in which plaintiffs present sensitive federal constitutional claims that the resolution of a difficult state law issue might moot or alter. Instead, federal courts will wait for state courts to resolve the state law issues that might make the resolution of federal constitutional claims unnecessary. The Younger doctrine takes its name from Younger v. Harris, in which the Supreme Court held that federal courts must virtually always abstain from adjudicating suits seeking injunctions against pending state criminal proceedings. Subsequent cases have extended Younger abstention to encompass suits for injunctions against a broader array of state judicial and quasi-judicial proceedings, including some in which neither a state nor its officials appeared as parties.

Id.

206. Laura A. Smith, *Justiciability and Judicial Discretion: Standing at the Forefront of Judicial Abdication*, 61 GEO. WASH. L. REV. 1548, 1608–09 (1993)).

Some might question why, even in the face of legislative inertia, courts can be trusted to resolve difficult legal questions.[207] This argument misses the mark. First, the Court should decide legal questions that are suited for judicial review and that result in workable rules to guide lower courts, regardless of the outcome of any given case.[208] In other words, this test speaks to ensuring fairer processes, not favorable outcomes. As Professor Issacharoff states, an "individual or a group should be allowed to participate in political decisionmaking regardless of whether it will make any difference to the *result*."[209]

Others may claim this proposal would open the floodgates to litigation and unduly burden the federal courts.[210] Such an argument fails to account for the substantial burden that this test places on litigants. Indeed, access to the courts would only slightly increase for a discrete class of litigants who can make a *prima facie* case that a challenged law violates a constitutional right. The additional requirements—the unavailability of redress in the legislature and the workability of a judicial resolution—would ensure that only meritorious cases presenting issues particularly suitable for judicial review would be heard.

The upshot is that a relatively small but significant number of litigants would gain access the courts. In doing so, courts would strike to protect politically powerless and traditionally disadvantaged groups who are vulnerable to the abuses of entrenched majority rule or the motives of self-interested political actors. By the same token, courts would not confer standing on litigants simply because they believe a law is unconstitu-

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207. *See generally* Martin Edelman, *Written Constitutions, Democracy, and Judicial Interpretation: The Hobgoblin of Judicial Activism*, 68 ALB. L. REV. 585, 594 (2005) (describing the views of James B. Thayer, and stating that "when the non-elected judiciary failed to defer to the policy choices of those agencies—failed to restrain their use of judicial review to negate those policies—the judges were thwarting the workings of democracy").

208. *See generally* Jonathan K. Van Patten, *Making Sense of Bush v. Gore*, 47 S.D. L. REV. 32, 32–33 (2002) (summarizing the harsh criticism directed at the Supreme Court after its decision in *Bush v. Gore*).

209. Issacharoff, *supra* note 168, at 1867 (quoting Lea Brilmayer, *Carolene, Conflicts, and the Fate of the Insider-Outsider*, 134 U. PA. L. REV. 1291, 1313 (1986)) (emphasis added). To be sure, the standard advocated here only governs access to the courts. It does not seek to advance a specific ideology or method of constitutional interpretation, such as living constitutionalism. *See*, e.g., Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 855 (2011) (explaining that "the meaning of the constitution is dynamic, capable of changing in response to changing conditions in society"); *see generally* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695 (1976) (giving insight into the application of the "living Constitution" doctrine).

210. Zachary D. Sakas, *Footnotes, Forest, and Fallacy: An Examination of the Circuit Split Regarding Standing in Procedural Injury-Based Programmatic Challenges*, 13 U. BALT. J. ENVTL. L. 175, 190 (2006) ("One of the central functional concerns is over whether a low standing threshold will open the floodgates for litigants.").

tional, assert vague allegations of harm, or claim that redress through the legislative process, while possible, would be more difficult (but not impossible) to achieve. As a result, courts would still respect separation-of-powers principles, yet provide an avenue by which to safeguard fundamental constitutional rights.

Ultimately, because most constitutional rights "can be infringed by legislative inaction,"[211] courts have a duty to intervene where such inaction [or arbitrary action] deprives citizens of the rights to which they are constitutionally entitled. When arbitrary laws are "the very source of the constitutional violation,"[212] deference to the legislature "allows that violation to persist"[213]and can threaten "democratic legitimacy."[214] For these reasons, although courts should be concerned about "political capital and legitimacy, they cannot do so too strongly without radically changing (or abandoning) the meaning and function of an independent judiciary."[215] That duty is to ensure that all citizens possess rights *and* remedies.

IV. CONCLUSION

The Court should modify the standing doctrine in some contexts for the same reason that it did in *Shelby County* where it invalidated two provisions of the Voting Rights Act: the legislature cannot and will not fix the problem.[216] No legal doctrine should be applied without examining whether elected representatives are capable of remedying specific harms and accounting for the relative unfairness in democratic governance.[217] When the traditional standing requirements are rigidly applied without considering these factors, the Court undermines the separation of powers and prevents sound judicial decision-making. In essence, rigid application of the standing doctrine sends a message to litigants that they have "come to the wrong branch of government, even though no other branch is capable of addressing the crux of her claim."[218] That message should not be tolerated in a democratic society where fundamental constitutional rights provide the foundation for individual liberty, and the judiciary safeguards those rights against arbitrary deprivation.

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211. Elder, *supra* note 145, at 767.
212. *Id.* at 767.
213. *Id.* at 767–68.
214. Teter, *supra* note 27, at 1488.
215. Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 415 (2011).
216. Elliott, *Congress's Inability*, *supra* note 164, at 177–78 (noting that "[s]ome contend that standing doctrine cannot be fixed and should instead be abandoned altogether").
217. *See* Roederer, *supra* note 30, at 665–66.
218. Ewing & Kysar, *supra* note 215, at 413.

The Court's jurisprudence should implicitly acknowledge that elected representatives sometimes act in self-interested ways. The nature of democratic governance means that elected representatives will, at least part of the time, make decisions to garner popularity with voters, increase the likelihood of reelection, and build entrenched majorities. For the same reason, elected officials may be reticent to address politically unpopular issues or vote to enact or re-authorize laws that raise serious constitutional questions. Whether through action or inaction, the result is the same, and the remedy can only come from one branch: the judiciary.

Unfortunately, by applying the standing doctrine, courts can, wittingly or not, concentrate power in the legislative branch and give it the power not only to make laws but to insulate itself from the constitutional constraints on its lawmaking power. Such application of the standing doctrine can result in a political process that eschews accountability and transparency and embraces a system of democratic governance for the privileged at the expense of the powerless. Part of the judiciary's role is to prevent abuses of the political process, and to protect individual rights against dysfunction in the political process. Sometimes democracy is enhanced through undemocratic means, and if federalism is to "increase[] opportunit[ies] for citizen involvement in democratic processes,"[219] citizens must know that rights are not without remedies, and that their status under the law is equal. Simply put, when the legislature cannot adequately address an issue or remedy a legal harm, the judiciary should.

219. Helen Hershkoff, *State Courts and the 'Passive Virtues': Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1915 (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

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